United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-4246

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

GRACIELA ACEVEDO,

Petitioner,

- v -

Docket No. 75-4246

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

B
P/S

PETITIONER'S BRIEF

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FEBRUARY, 1976

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PETITIONER'S BRIEF

STATEMENT OF THE ISSUE

Whether the Board of Immigration Appeals erroneously denied the motion to reopen by disregarding the contents of the application for suspension of deportation under Section 244 (a) (1) (2) of the Immigration and Nationality Act of 1952 as amended.

STATEMENT OF THE CASE

Petitioner Graciela Acevedo is a native and citizen of El Salvador who entered the United States on or about September 2, 1968 as a non-immigrant visitor, and was authorized to remain in the United States until September 14, 1969. At a hearing held on April 25, 1975 an order was entered finding her deportable and granting her voluntary departure to be effected by July 24, 1975 with an alternate provision for deportation to El Salvador upon her failure to depart when required. No appeal was taken from that order. (R. 21a)

The petitioner has met the requisite seven years continuous physical presence in the United States as of September 3, 1975 and the Immigration Judge denied the motion to reopen the proceedings for the purpose of applying for suspension of deportation on the grounds that the motion to reopen proceedings must state the new facts to be proved at the reopened hearing and be supported by affidavits or other evidentiary material. (R. 4a-5a)

The Board of Immigration Appeals affirmed (R. 1a). This petition for review followed.

ARGUMENT

POINT I. The application for suspension and its supporting documents attached to the motion to reopen constituted new facts.

The petitioner was not eligible to apply for suspension of deportation under Section 244 (a) (1) (2) (b) (c) of the Immigration and Nationality Act until she had seven years continuous physical presence in the United States (see page infra).

This fact could not have been alleged at the original deportation hearing and thus required a motion to reopen the deportation hearing.

The Board of Immigration Appeals conceded this point in the second paragraph of their decision (R. 1a).

POINT II. The application for suspension and its supporting documents attached to the motion to reopen clearly constituted "affidavits or other evidentiary material", as required by 8 C.F.R. Sec. 242.22 and 8 C.F.R. Sec. 103.5

8 C.F.R. Sec. 242.22 and 8 C.F.R. Sec. 103.5 state that a motion to reopen must be supported by "affidavits and other evidentiary material." The

application for suspension signed by the alien plus the two affidavits, the income tax returns, and all other supporting documents which were submitted with the motion clearly complied with the requirement. (R. 7a-20a)

POINT III. The Board of Immigration Appeals by its decision denying the motion to reopen adjudicated the application for suspension of deportation on its merits without granting a hearing on the said application.

The Matter of Sipus , Interim Decision #2172 cited in support is clearly distinguishable from the instant case. In the cited decision the Board of Immigration Appeals stated ,"neither the husband nor any of the children is listed as a permanent resident alien. Respondent also lists six brothers and sisters, all natives and citizens of the Philippines, now also presumably residing there." and "from what already appears, it is clear that all her close relatives are in Philippines." In the instant case the petitioner is married to a United States Citizen from which she is separated.

Furthermore, the petitioner herein suffered a serious accident which was also included as part of her record.

The Board of Immigration Appeals in the cited decision, Matter of Sipus, Interim Decision #2172 conceded, "on the other hand, we have on occasion overlooked the technical inadequacy of a motion to reopen where the new facts alleged, when coupled with the facts already of record, satisfy us that it would be worthwhile to develop the issues further at a plenary hearing on reopening."

Thus, it is clear that the petitioner was denied procedural due process of law in not being able to develop the issues further at a reopened deportation hearing.

CONCLUSION

The decision of the Board of Immigration Appeals should be vacated. The motion to reopen should be granted and the petitioner should be accorded a hearing on her application for suspension of deportation.

Respectfully submitted,

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February, 1976

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Immigration and Nationality Act of 1952.

Section 106 (a) (4) of the Act provides, in pertinent part :

> "the Attorney General's findings of fact if supported by reasonable, substantial and probative evidence on the record considered as a whole, shall be conclusive".

Reopening or reconsideration.

8 C.F.R. Sec. 103.5

Except as otherwise provided in Part 242 of this chapter, a proceeding authorized under this chapter may be reopened or the decision made therein reconsidered for proper cause upon motion made by the party affected and granted by the officer who has jurisdiction over the proceeding or who made the decision. When the alien is the moving party, a motion to reopen or a motion to reconsider shall be filed in duplicate, accompanied by a supporting brief, if any, and the appropriate fee specified by and remitted in accordance with the provisions of Sec. 103.7 with the district director in whose district the proceeding was conducted for transmittal to the officer having jurisdiction. When an officer of the Service is the moving party, a copy of the motion shall be served on the alien or other party in interest and the motion, together with proof of service, shall be filed directly with the officer having jurisdiction. The party opposing the motion shall have 10 days from the date of service thereof within which he may submit a brief, which period may be extended. If the officer who originally decided the case is unavailable, the motion may be referred to another officer. A motion to reopen shall state the new facts to be proved at the reopened proceeding and shall be supported by affidavits or other evidentiary material. A motion to reconsider shall state the reasons for reconsideration and shall be supported by such precedent decision as are pertinent. Motions to reopen or reconsider shall state whether the validity of the order has been or is the subject of any judicial proceeding and, if so, the nature and date thereof, the court in which such proceeding took place or is pending, and its result or status. Rulings upon motions to reopen or motions to reconsider shall be by written decision. The filing of a motion to reopen or a motion to reconsider or of a subsequent application after notice of denial shall not, unless the Service directs otherwise, serve to stay the execution of any decision made in the case or to extend a previously set departure date.

Reopening or reconsideration.

8 C.F.R. Sec. 242.22

Except as otherwise provided in this section, a motion to reopen or reconsider shall be subject to the requirements of Sec. 103.5 of this chapter. The special inquiry officer may upon his own motion, or upon motion of the trial attorney or the respondent, reopen or reconsider any case in which he had made a decision, unless jurisdiction in the case is vested in the Board under Part 3 of this chapter. An order by the special inquiry officer granting a motion to reopen may be made on Form I-323. A motion to reopen will not be granted unless the special inquiry officer is satisfied that evidence sought to be offered is material and was not available and could not have been discovered or presented at the hearing; nor will any motion to reopen for the purpose of providing the respondent with an opportunity to make an application under Sec. 242.17 be granted if respondent's right to make such application was fully explained to him by the special inquiry officer and he was afforded an opportunity to do so at the hearing, unless circumstances have arisen thereafter on the basis of which the request is being made. The filing of an application for adjustment of status under Sec. 245 of the Act may be considered as the motion to reopen when the application shows new material not available or ascertainable at the time of the deportation hearing. The filing with a special inquiry officer of a motion under this section shall not serve to stay the execution of an outstanding decision; execution shall proceed unless the special inquiry officer who has jurisdiction over the motion specifically grants a stay of deportation. In his discretion the special inquiry officer may stay deportation pending his determination of the motion and also pending the taking and disposition of an appeal from such determination.

Immigration and Nationality Act of 1952.

Section 244 (a) (1) (2) of the Act provides, in pertinent part :

"SUSPENSION OF DEPORTATION - ADJUSTMENT OF STATUS FOR PERMANENT RESIDENCE; CONTENTS"

(a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and —

(1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence; or

(2) is deportable under paragraphs (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of section 1251(a) of this title; has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

Thomas J. Cahill (pd).
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February 5, 1976

UNITED STATES ATTORNEY